

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROSALIE HORKAN D/B/A	:	
FARM & CITY CASH FUEL	:	DETERMINATION
	:	DTA NO. 819663
for Review of a Denial, Suspension, Cancellation or	:	
Revocation of a License, Permit or Registration under	:	
Articles 12-A and 13-A of the Tax Law.	:	

Petitioner, Rosalie Horkan d/b/a Farm & City Cash Fuel, 355 Spring Lake Road, Red Hook, New York 12571, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 12-A and 13-A of the Tax Law.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 14, 2003 at 10:00 A.M., which date began the six-month period for the issuance of this determination. Petitioner appeared by James F. Seeley, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether petitioner has established that the Division's cancellation of its registration as a Retailer of Heating Oil Only is unwarranted.

FINDINGS OF FACT

1. Petitioner, Rosalie Horkan d/b/a Farm & City Cash Fuel, filed an Application for Registration under Articles 12-A and 13-A of the Tax Law ("Form TP-650"). This application, hand-dated as signed on January 22, 2002 and stamp-dated as received by the Division of

Taxation (“Division”) on January 24, 2002, indicates that petitioner sought to be registered solely as a retailer of heating oil only. Item “12a” of this application, which requires a listing of all “owners, officers, directors, partners and responsible employees” of the applicant, listed only Rosalie Harkin as the sole proprietor and 100 percent owner of the business. The instruction sheet for Form TP-650 requires, with regard to item “12a”, that the applicant must specify those individuals having the final authority for signing business checks; signing the business tax returns; paying creditors; making the final decision on which bills are to be paid; conducting the business’s general business affairs; filing returns or paying the motor fuel and diesel motor fuel taxes (Article 12-A) or the petroleum business tax (Article 13-A); and complying with any other requirement of the New York State Tax Law. The application, which indicates petitioner to be a “new company,” is signed by Rosalie Horkan as “sole proprietor.” The application lists the address of petitioner’s principal place of business as “355 Spring Lake Road, Red Hook, New York 12571.”

2. Petitioner was registered as a retailer of heating oil only on August 5, 2002. As a retailer of heating only, petitioner was required to file petroleum business tax returns (“Form PT-200”) and sales tax returns (“Form ST-100”) on a quarterly basis, beginning with the month of August 2002.

3. Petitioner timely filed the required petroleum business and sales tax returns for the quarter ended August 31, 2002. However, petitioner failed to file the petroleum business and sales tax returns for the quarter ended November 30, 2002. As a result, the Division issued to petitioner, on February 14, 2003, a Failure to File Petroleum Business Tax Return (“Form AU-568”), which stated as follows:

All registered petroleum businesses and aviation fuel businesses must file a return even if no business is conducted. Our records indicate that you did not file the following petroleum tax return for the period indicated:

September 2002 thru November 2002 - PT-200, PT-201

Failure to file the required return or respond to this notice within 20 days from the date of this notification may result in the cancellation of your Article 12-A and Article 13-A registrations.

4. Following petitioner's failure to file petroleum business and sales tax returns for the quarter ended February 28, 2003, the Division issued to petitioner, on April 21, 2003, a Demand for NYS Petroleum Tax Return And/or Payment of Taxes Due Pursuant to Articles 12-A, 13-A, 28 and 29. The Demand for NYS Petroleum Tax Return was sent by certified mail to 355 Spring Lake Road, Red Hook, New York 12571. The letter informed petitioner that a demand was being made pursuant to Tax Law § 283(5) for payment of any taxes due under Articles 12-A, 13-A, 28 and 29 and/or the filing of all the delinquent petroleum business tax returns. The letter further stated that:

It has come to our attention that you do not have an active sales tax profile with New York State. A condition of registration as a retailer of Heating Oil Only is an active sales tax profile.

There is no record of the taxpayer having filed New York State Tax returns for the following periods:

<u>Tax Return Type</u>	<u>Filing Periods</u>
Petroleum Business tax	Q12003, Q42002 ¹

If payments and/or returns are not received within ten (10) business days of the date of this letter, your registration under Article 12-A and 13-A will be canceled, pursuant to Tax Law § 283(5).

5. On May 8, 2003, the Division issued to petitioner a Notice of Cancellation of Your Registration as a Retailer of Heating Only under Articles 12-A and 13-A of the New York State

¹ Quarters ending November 30, 2002 and February 28, 2003.

Tax Law. The notice stated that the registration was being canceled as a result of petitioner's failure to respond to the Division's letter dated April 21, 2003 in which the Division demanded the filing of delinquent tax returns and reactivation of petitioner's sales tax profile.

6. Shortly after receiving its certification of registration as a retailer of heating oil only in August 2002, petitioner hired Angelo Battista to handle the preparation and filing of its tax returns. Mr. Battista, who advertised that he was a certified public accountant, had prepared and filed the personal and business returns of Ms. Horkan's daughter for two years prior to being hired by petitioner, and had indicated that he was familiar with the returns that were required to be filed by a retailer of heating oil only. In October 2003, Ms. Horkan was advised by the New York State Education Department that a search of its records found no record of entry in the name of Angelo Battista as having received a license to practice certified public accountancy in New York State.

7. Upon receiving the Failure to File Petroleum Business Tax Return form, dated February 14, 2003, Ms. Horkan contacted Mr. Battista numerous times to ascertain why the Division had not received the required tax returns, and to request that he send her copies of the returns he claimed had been filed. She followed the same procedure after receiving the Demand for NYS Petroleum Return, dated April 21, 2003, and the Notice of Cancellation, dated May 8, 2003. Each time, Mr. Battista assured her that the returns had been filed and that he was in contact with the appropriate Division employees in an effort to correct the situation. Mr. Battista never sent her copies of the returns he claimed to have filed, and in October 2003, Ms. Horkan, convinced that the returns had not been filed, forwarded to the Division the tax returns for the quarters ended November 30, 2002, February 28, 2003 and May 31, 2003. All of the returns

filed indicated no tax due. Ms. Horkan also filed at this time an application to be registered as a sales tax vendor.

CONCLUSIONS OF LAW

A. Tax Law § 282-a(1) imposes an excise tax upon sales of diesel motor fuel sold in New York State, and prohibits any person from engaging in the sale of diesel motor fuel in the State unless registered as a distributor. Tax Law § 282-a(2) allows for the registration of a distributor of diesel motor fuel as a retailer of heating oil only, if such distributor makes sales of diesel motor fuel to consumers solely for heating purposes. Notwithstanding that such distributor may be registered for retail sales of heating oil only, the full registration provisions of Tax Law § 283 are applicable to such registration of retailers.

B. Tax Law § 283(5) provides, in relevant part, as follows:

Provided, further, a registration may be canceled or suspended without a prior hearing, for failure to file a return within ten days of the date prescribed for filing a return under this article or article twenty-eight of this chapter with respect to sales and uses of motor fuel, or for nonpayment of any taxes due pursuant to this article or article twenty-eight or twenty-nine of this chapter with respect to sales and uses of motor fuel if the registrant shall have failed to file such return or pay such taxes within ten days after the date the demand therefor is sent by registered or certified mail to the address of the distributor given in his application for registration,

The clear aim of the registration provisions of Tax Law § 283(5) is to insure that distributors involved in the sale and use of motor fuel and diesel motor fuel file timely petroleum business and sales tax returns and make timely payment of the tax due, and that where a distributor fails to comply with these requirements, the Division is in possession of a remedy to either insure compliance or the authority to promptly cancel the registration of the distributor.

C. In recent years, the Legislature has enacted an elaborate system concerning registration, licensing and record keeping with respect to persons engaged in manufacturing, importing, selling, distributing and transporting motor fuel and diesel motor fuel in New York State. The intent behind this system, specifically as it relates to registration, was discussed in *Matter of Diamond Terminal Corporation v. Dept. of Taxation & Finance* (158 AD2d 38, 557 NYS2d 962, *lv denied* 76 NY2d 711, 563 NYS2d 767), where the Court observed with regard to Tax Law § 283-b that:

the bill would enable [the Commissioner] to examine more closely the persons involved in the importation process . . . by expanding the provisions of law regarding the registration of distributors and the cancellation and suspension of registrations. The expanded provisions would permit an examination into the character of the persons controlling the distributor and would make it more difficult to circumvent the statutory standards (Mem of Commissioner of Taxation and Finance, Governor's Bill Jacket, L1986, ch 276).

In *Matter of OK Petroleum Products Corp.* (Tax Appeals Tribunal, November 1, 1990), the Tribunal stated the following with respect to the registration provisions of Tax Law Article 12-

A:

[t]he obvious intent of the change in the registration provisions was to provide the Commissioner with the opportunity to decide whether the distributors who would be receiving tax moneys and holding them in trust until paid over to the State could be relied upon to properly exercise their tax collection responsibilities (*see* , Memorandum of State Department of Taxation and Finance, 1986 McKinney's Session Laws of NY, at 2882).

D. The Division's determination to cancel petitioner's registration should be sustained.

The Division's grounds for cancellation are premised essentially upon two facts, to wit:

1) that petitioner failed to file petroleum business and sales tax returns for a one year period; and

(2) that petitioner failed to respond to the Division's Demand for NYS Petroleum Tax Return, dated April 21, 2003.

E. In support of her position that the registration should not be canceled, petitioner argues that it was the accountant who failed to file the required tax returns. In considering the argument that the taxpayer did everything that he could to ensure compliance with the Tax Law by hiring a particular accounting firm, the Tribunal in *Matter of McGaughey* (Tax Appeals Tribunal, March 19, 1998) stated:

It is a well-settled principle that each taxpayer has a nondelegable duty to prepare and file timely tax returns with payment and the mere assertion, without more, of reliance upon professional advisors or employees does not constitute reasonable cause (*see, Logan Lumber Co. v. Commissioner*, 365 F2d 846; *see also, Sanderling, Inc. v. Commissioner*, 571 F2d 174).

In making a determination as to whether reasonable cause exists when a taxpayer has relied on the advice of a professional, it must be shown that the taxpayer relied in good faith on the advice he received and it must have been “reasonable” for the taxpayer to rely upon the particular advice he was given (*see, LT & B Realty Corp. v. New York State Tax Commn.*, 141 AD2d 185, 535 NYS2d 121). When determining whether the taxpayer has shown that his reliance was reasonable, the burden is on the taxpayer to demonstrate that he acted with ordinary business care and prudence in attempting to ascertain his liability, if any, for taxes (*see, United States v. Boyle*, 469 US 241; *Matter of Koether, supra*).

F. Petitioner unquestionably bears the burden of establishing that the grounds stated by the Division do not support its Notice of Cancellation (*Matter of Janus Petroleum*, Tax Appeals Tribunal, July 11, 1991, *annulled on other grounds, Matter of Janus Petroleum v. Tax Appeals Tribunal*, 180 AD2d 53, 583 NYS2d 983). In this case, it appears that Ms. Horkan simply absolved herself of her tax obligations. Rather than showing that she acted with ordinary business care and prudence in her dealings with Mr. Battista, the evidence establishes that despite the repeated Division notices that the returns had not been filed, and the repeated failure

of Mr. Battista to provide to Ms. Horkan copies of the returns he claimed to have filed on behalf of the business, Ms. Horkan continued to rely on his statements that the returns had been filed. It may have been reasonable for her to rely on the accountant's assurances after the initial notice from the Division in February 2003, but after not receiving copies of the returns for the quarters ended November 30, 2002 and February 28, 2003 and receiving the demand for returns in April 2003, it was incumbent on Ms. Horkan to do more than simply again contact Mr. Battista and again inquire as to whether the returns had been filed. It had been established, certainly by April 2003, that Mr. Battista was unreliable and had not filed the required returns, and Ms. Horkan's continued reliance on his empty promises was not reasonable under the circumstances and establishes that she did not act with ordinary business care and prudence. Accordingly, the Division's cancellation of petitioner's registration is sustained.

G. The petition of Rosalie Horkan d/b/a Farm and City Cash Fuel is hereby denied and the Division's Notice of Cancellation, dated May 8, 2003, is sustained.

DATED: Troy, New York
December 4, 2003

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE